



1 In May 2008, Samano and Samano Reyes filed bankruptcy.  
2 Thereafter, they became delinquent on assessments and fees they  
3 owed to the homeowners association, defendant Wingfield Springs  
4 Community Association ("Wingfield"). Samano and Samano Reyes were  
5 discharged from bankruptcy in February 2011, and the bankruptcy was  
6 terminated on August 3, 2011. After filing and recording various  
7 foreclosure notices throughout 2011 and 2012, including during the  
8 pendency of Samano and Samano Reyes' bankruptcy, Wingfield  
9 foreclosed upon its HOA lien on the property, and the property was  
10 sold at a foreclosure sale in 2012. During the foreclosure  
11 process, Wingfield was first represented by Nevada Association  
12 Services and later by ATC Assessment Collection Group, LLC ("ATC").

13 Plaintiff Green Tree Servicing LLC is the current servicer of  
14 the subject loan and beneficiary of the subject deed of trust.  
15 Plaintiff has filed suit against Wingfield, alleging that it,  
16 through its foreclosure agents, failed to comply with statutory  
17 notice and mailing requirements and violated the automatic  
18 bankruptcy stay. It alleges that the HOA sale was therefore  
19 invalid as well as commercially unreasonable.

20 In response, Wingfield has filed a third-party complaint  
21 against ATC Assessment Collection Group, LLC ("ATC"), its  
22 foreclosure agent at the time of the foreclosure sale, asserting  
23 claims of express indemnity, equitable indemnity, and contribution.  
24 ATC now moves to dismiss the claims of express indemnity and  
25 equitable indemnity pursuant to Federal Rule of Civil Procedure  
26 12(b)(6) (#25). Wingfield has responded (#32), and ATC has replied  
27 (#36).

28 In considering a motion to dismiss under Rule 12(b)(6), the

1 court must accept as true all material allegations in the complaint  
2 as well as all reasonable inferences that may be drawn from such  
3 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.  
4 2000). The allegations of the complaint also must be construed in  
5 the light most favorable to the nonmoving party. *Shwarz v. United*  
6 *States*, 234 F.3d 428, 435 (9th Cir. 2000). However, legal  
7 conclusions are not entitled to the presumption of truth. *Ashcroft*  
8 *v. Iqbal*, 556 U.S. 662, 679 (2009).

9 While plaintiff is required to give only a 'short and plain  
10 statement' of their claims in the complaint," *Paulsen v. CNF, Inc.*,  
11 559 F.3d 1061, 1071 (9th Cir. 2009), a complaint must also "contain  
12 sufficient factual matter . . . to state a claim to relief that is  
13 plausible on its face." *Iqbal*, 556 U.S. at 678. "A claim has  
14 facial plausibility when the plaintiff pleads factual content that  
15 allows the court to draw the reasonable inference that the  
16 defendant is liable for the misconduct alleged." *Id.*

17 In ruling on a Rule 12(b)(6) motion to dismiss, a court may  
18 consider documents incorporated by reference without converting the  
19 motion into a motion for summary judgment. *United States v.*  
20 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). Incorporation by  
21 reference allows the court to consider documents not attached to  
22 the complaint if the authenticity of the documents is not  
23 questioned and either (1) the plaintiff's claim depends on the  
24 contents of the document, or (2) the contents of the document are  
25 alleged in the complaint. *Kneivel v. ESPN*, 393 F.3d 1068, 1076  
26 (9th Cir. 2005). The court may consider the entirety of a document  
27 incorporated by reference and is not limited to considering only  
28 those portions mentioned in the complaint. *In re Stac Electronics*

1 *Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

2 Wingfield bases its express indemnity claim on an  
3 indemnification provision in the parties' agreement.<sup>1</sup> That  
4 provision states:

5 ATC agrees that if any claims or any proceedings are  
6 brought against the Client, whether by a governmental  
7 agency, private person, or otherwise, in which it is  
8 alleged that ATC has violated any law, regulation, order  
9 or ruling, ATC shall defend, indemnify and hold Client  
10 harmless against any liabilities, loss, damage, or  
11 expense, including but not limited to attorney's fees and  
12 court costs, to the extent such claims are a result of  
13 the assertion that ATC has violated such law, regulation,  
14 order or ruling. Client will be responsible for all  
15 costs, including attorney's fees, which are the result of  
16 actual or alleged conduct of Client.

17 ATC, however, argues that Wingfield's express indemnification  
18 claim is subject to the agreement's arbitration provision, which  
19 provides:

20 Any dispute arising out of this Agreement shall first be  
21 submitted to mediation as a condition precedent to  
22 proceeding with arbitration. If the dispute cannot be  
23 resolved in mediation, any dispute arising out of this  
24 Agreement shall be resolved by binding arbitration  
25 pursuant to the rules of the American Arbitration  
26 Association or Judicial Arbitration and Mediation  
27 Services. . . . This mediation and arbitration provision  
28 applies only to disputes between Client and ATC and  
expressly does not provide a right to mediation or  
arbitration to any third party including, without  
limitation, a homeowner subject in the delinquent  
assessment collection process.

ATC asserts that all claims of alleged wrongdoing in the  
plaintiff's complaint concern actions taken by NAS and not by ATC.  
As such, ATC argues that the complaint does not allege that ATC  
"violated any law, regulation, order or ruling" and therefore the

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<sup>1</sup> The court may consider the agreement under the incorporation by reference doctrine without converting the motion to dismiss to a motion for summary judgment. Wingfield's claim relies upon the agreement, and the agreement's authenticity is not questioned.

1 indemnification provision of the agreement does not apply.  
2 However, because Wingfield believes the indemnification provision  
3 does apply and that ATC therefore owes a duty both to defend and to  
4 indemnify Wingfield in this case, ATC asserts, there is a dispute  
5 over what the agreement requires, and that dispute must be  
6 submitted to arbitration.

7       Whether a dispute must be arbitrated "is an issue for judicial  
8 determination unless the parties clearly and unmistakably provide  
9 otherwise." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733,  
10 738 (9th Cir. 2014). The parties have not argued that the  
11 arbitrability of their dispute is a question for the arbitrator,  
12 nor does the agreement appear to contain any clear and unmistakable  
13 provision requiring such. Accordingly, the question of  
14 arbitrability is for this court.

15       The parties agree that until May 4, 2011, collection  
16 activities with respect to 2400 Dodge Drive were conducted by NAS,  
17 and that ATC took over collection activities beginning on May 5,  
18 2011. On or about April 11, 2011, a Notice of Delinquent  
19 Assessment Lien was recorded. On or about July 15, 2011, a Notice  
20 of Default and Election to Sell under Homeowners Association Lien  
21 was recorded. On June 12, 2012, an Intent to File Notice of Sale  
22 was recorded. On August 23, 2012, a Notice of Sale was recorded.  
23 On September 26, 2012, the property was sold at auction, and on  
24 October 1, 2012, the Trustee's Deed Upon Sale was recorded. Samano  
25 and Samano Reyes' bankruptcy, filed on May 17, 2008, was terminated  
26 on August 3, 2011.

27       The plaintiff's first amended complaint alleges that several  
28 of the foreclosure notices violated the bankruptcy stay and/or were

1 otherwise deficient. The parties apparently agree that the notices  
2 that violated the bankruptcy stay were not filed, recorded, or  
3 mailed by ATC.<sup>2</sup> However, in addition to those allegedly invalid  
4 notices, the complaint alleges that: (1) "the HOA and its  
5 foreclosure agents did not comply with all mailing and notice  
6 requirements stated in N.R.S. 116.31162 through N.R.S. 116.31168";  
7 (2) the "HOA assessment lien and foreclosure notices included  
8 improper fees and costs in the amount demanded"; (3) the "HOA Sale  
9 violated [plaintiff's] rights to due process because it, its  
10 agents, loan servicers, and/or predecessors in interest were not  
11 given proper, adequate notice and the opportunity to cure the  
12 deficiency or default in the payment of the HOA's assessments"; (4)  
13 the "HOA Sale did not comply with N.R.S. 116.3102 et seq."; and (5)  
14 the sale price at the HOA sale "was not commercially reasonable";  
15 and (6) the HOA sale was not "conducted in good faith." Further,  
16 the complaint alleges that because the various notices were  
17 deficient or invalid, the resulting foreclosure sale was unlawful,  
18 void, and invalid.

19 The complaint does not separate its allegations with respect  
20 to Wingfield's two collection agents. Accordingly, all of the  
21 complaint's general allegations of wrongdoing, at this stage of the  
22 proceedings, must be construed as claims against both agents.  
23 Moreover, the complaint alleges that the foreclosure sale itself  
24 was unlawful and invalid, and it is undisputed that ATC conducted  
25 the foreclosure sale. Thus, the complaint very clearly alleges

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27 <sup>2</sup> Although the Notice of Default and Election to Sell under Homeowners  
28 Association Lien was recorded on July 15, 2011 after ATC took over  
collection activities, Wingfield has not argued that ATC was responsible for  
the filing or recording of this notice.

1 that ATC, or Wingfield through ATC, violated the law. The court  
2 therefore concludes that as the indemnification provision clearly  
3 applies, there is no dispute arising out of the agreement that must  
4 be submitted to arbitration, and the motion to dismiss on that  
5 basis is accordingly **DENIED**. The denial will be without prejudice  
6 to renew after the close of discovery should discovery support a  
7 renewal of the motion.

8 ATC's motion to dismiss the equitable indemnity claim is  
9 likewise denied without prejudice.

10 In accordance with the foregoing, ATC's motion to dismiss  
11 (#25) is hereby **DENIED WITHOUT PREJUDICE**.

12 IT IS SO ORDERED.

13 DATED: This 18th day of November, 2015.

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15 UNITED STATES DISTRICT JUDGE  
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